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Annette Bulger Mathis

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JUDGES, THOU SHALT NOT USE THINE OWN RELIGION IN THY OPINIONS

*Annette Bulger Mathis**

I. INTRODUCTION

When rendering judicial opinions, should judges rely on the laws of the land or on the laws of religion? In 2002, Alabama Supreme Court's Chief Justice Moore argued in a concurring opinion for a per se rule denying homosexuals the right to parenthood in part on "the law of nature and of nature's God as understood by men through reason, but aided by direct revelation found in the Holy Scriptures."[1] According to Chief Justice Moore, homosexual conduct of a parent "creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others."[2] This Comment will examine Chief Justice Moore's opinion in light of Kent Greenawalt's principles of restraint for judges set forth in *Private Consciences and Public Reasons*.[3] Greenawalt maintains that only in rare circumstances may judges rely on their own religious beliefs, and even in those rare circumstances, judges should not include *personal* convictions—whether moral or religious—in written judicial opinions.[4] Chief Justice Moore violated Greenawalt's principles of restraint when he incorporated his own personal convictions in his opinion in *Ex parte H.H.* Greenawalt's principles of restraint will be explained in Part II of this Comment. In Part III, *Ex parte H.H.* will be examined and will then be analyzed in Part IV using Greenawalt's principles of restraint. Finally, the propriety of Greenawalt's principles of restraint will be discussed in Part V.

II. GREENAWALT'S PRINCIPLES OF RESTRAINT

A. The Principle of Public Accessibility: Accessible Grounds Versus Nonaccessible Grounds

In *Private Consciences and Public Reasons*, Greenawalt explores the question, "What grounds are proper for people making political decisions and arguments within a liberal democracy?"[5] Greenawalt sets forth principles of restraint for public officials and concludes that judges are the most constrained of all public officials.[6] Greenawalt's principles of restraint and, in particular, his belief that "religious beliefs should remain outside politics" are based on two grounds: (1) the inaccessibility of religious beliefs and (2) the recognition of incompatible, diverse religious beliefs in the United States.[7] According to Greenawalt,

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* The author thanks Professor Mark Modak-Truran for his guidance and objectivity in the drafting of this Comment.

1. *Ex parte* H.H., 830 So. 2d 21, 32 (Ala. 2002).
2. *Id.* at 26.
3. KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995).
4. *Id.*
5. *Id.* at 4.
6. *Id.* at 4, 141.
7. *Id.* at 4.

> If freedom of religion exists, diverse religious views are bound to emerge and continue; religion engenders such strong passions that it will inevitably be a source of tension; and that tension will be aggravated by reliance on religious grounds in political decisions and arguments. Relatedly, social unity in liberal democracies will always be fragile enough so that argument in terms of nonaccessible grounds will be harmful.[8]

Greenawalt emphasizes that in a pluralist society such as the United States, political decisions and arguments should be based on grounds that are accessible to others, in other words, grounds that are open and available to all.[9] In Greenawalt's own words, "Do not publicly rely on grounds that are not accessible to others."[10] Nonaccessible grounds are grounds that are not open and available to all and should not be used.[11] For Greenawalt, "the critical feature of appropriate political grounds" is "public accessibility."[12]

B. Accessible Views

Greenawalt sets forth the following three types of accessible grounds that *are* appropriate bases for political decision-making because they are open and available to all: (1) realist grounds, (2) shared social grounds, and (3) authority grounds.[13]

1. Accessible Views Based on Realist Grounds

Realist grounds are open and available to all and are, therefore, appropriate grounds for political decision-making and argument. A realist ground is a moral claim that asserts an objective truth as opposed to mere taste or preference, which is subjective.[14] Realist grounds consist of moral claims that remain valid or true regardless of "what people in a particular time and place happen to think is moral."[15] Realist grounds withstand the test of time, place, and culture.[16] For example, according to Greenawalt, "[A] great many moral and political judgments can be justified on accessible realist grounds: 'Other things being equal, happiness is better than pain, love is better than hate, health is better than illness . . . [and] people should act to promote health, happiness, and love, rather than illness, pain, and hate.'"[17]

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8. *Id.* at 130.
9. *Id.* at 128.
10. *Id.*
11. *See id.* at 142.
12. *Id.* at 5.
13. *Id.* at 24.
14. *Id.* at 25.
15. *Id.*
16. *Id.*
17. *Id.* at 27.

According to a realist view, moral claims are objectively true or false.[18] The truth or falsity of a moral claim must be reached by common human understanding, not just a select few individuals.[19] Greenawalt clarifies that moral realism does not "include a view that God reveals moral truth to a selected few."[20] He cautions that individuals can be mistaken as to the truthfulness of a moral claim.[21] He further cautions that not all realist claims can be relied upon because some realist claims may violate a more basic moral right of liberty and personal autonomy.[22] For example, a realist argument that watching sports on television is unproductive may perhaps be true.[23] However, it is not a valid argument for censorship because it violates a moral right to liberty and personal autonomy.[24]

2. Accessible Views Based on Shared Social Grounds

The second type of appropriate grounds for political decision-making is a shared social ground.[25] Shared social grounds are grounds based on widely held beliefs or, in other words, beliefs held by a broad consensus.[26] According to Greenawalt, shared social grounds may "extend beyond what can be justified directly on accessible realist bases."[27] Shared social grounds are closely related to realist grounds, and people often have difficulty distinguishing the two.[28] However, because both grounds are appropriate grounds for political decision-making, distinguishing the two is not vital.[29]

An example of a shared social ground is the belief that the government should treat all people equally.[30] Greenawalt proposes that "[c]oercing people on the basis of widely shared principles . . . is *ordinarily* appropriate."[31] However, he warns that some shared social grounds may be faulty.[32] Sometimes shared social grounds are the product of faulty values developed because of conditions during a particular time in history.[33] For example, because of unjust male domination, it was once a widely held view that women should be denied opportunities based solely on gender.[34] According to Greenawalt, unjust domination is a powerful argument against a shared social assumption.[35] "Any explicit argument based on shared social values must be ready to meet challenges that the values have illegitimate or unhealthy roots."[36]

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18. *Id.* at 26.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 23-24.
23. *Id.* at 27.
24. *Id.* at 23-24, 27.
25. *Id.* at 28.
26. *Id.*
27. *Id.*
28. *Id.* at 29.
29. *Id.* at 29-30.
30. *Id.* at 28.
31. *Id.*
32. *Id.* at 29.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 30.

3. Accessible Views Based on Authority Grounds

The third and final appropriate ground for political decision-making is authority. Legislators, judges, and executive officials are all constrained by written constitutions.[37] Greenawalt distinguishes the following three types of legal authority: (1) straightforward applications, (2) discretionary exercises, and (3) difficult interpretations.[38] Straightforward applications involve issues that the law directly addresses. Here, there is no need to consider realist or shared social grounds.[39] In these circumstances, an official should obey the law.[40] The second type of legal authority is discretionary exercises.[41] Discretionary exercises occur when a particular law allows officials discretion.[42] In these circumstances, officials should use realist and shared social grounds in exercising their allowed discretion.[43] Finally, the third type of legal authority involves interpretations.[44] Sometimes judges and other officials must interpret the law or, in other words, must provide judgment as to what the law should be said to require.[45] In these instances, judges and officials should also rely on accessible realist grounds or shared social grounds.[46]

C. Nonaccessible Views

Nonaccessible views should not be relied upon in political decision-making. A nonaccessible view is a belief that has no basis of proof.[47] In the words of Greenawalt, "[T]he believer lacks bases to show others the truth of what he believes."[48] He offers three reasons for rejecting grounds for political decision.[49] The first reason is an intrinsic inadequacy, meaning that the grounds are erroneous because of faulty methodology or assumption.[50] The second reason is unfairness, referring to grounds that impair a person's right to equality or liberty.[51] According to Greenawalt, "[I]n relations among people, or citizens, respect for integrity and equality precludes using some bases for decision that might otherwise be appropriate."[52] Finally, the third reason for rejecting a political ground is the likelihood of threat to social harmony, stability, or progress.[53]

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37. *Id.* at 31.
38. *Id.*
39. *Id.*
40. *Id.* at 31–32.
41. *Id.*
42. *Id.*
43. *Id.* at 32.
44. *Id.* at 31–32.
45. *Id.* at 32.
46. *Id.* at 33.
47. *See id.* at 39.
48. *Id.*
49. *Id.* at 24.
50. *Id.* at 23-24.
51. *Id.*
52. *Id.* at 24.
53. *Id.*

Greenawalt identifies three particular kinds of nonaccessible views that should not be included in political decision and argument. Those views include (1) religious views, (2) views about the good life, and (3) comprehensive views.[54] However, he emphasizes that people should not rely on beliefs that cannot be "*reasonably assessed by others*," regardless of whether the belief is religious, comprehensive, or about the good life.[55]

1. Religious Views

The first category of nonaccessible views is a view based on religion.[56] Greenawalt defines religion as that which "*typically* concerns a level of ultimate truth that is beyond, or deeper than, mundane human existence . . . [and] practices and organizations (such as the Ethical Culture Society [or Buddhism]) that largely replicate those of ordinary religions but do not make similar assumptions about ultimate truth."[57] Because religious views are generally nonaccessible, Greenawalt believes that such views may be inappropriate grounds for political decision-making.[58] This does not mean that nonbelievers cannot *understand* religious arguments but merely that such arguments will not be persuasive to nonbelievers.[59] According to Greenawalt, religion generally involves "a choice or judgment based on personal experience that goes beyond what reason can establish."[60]

Greenawalt offers three reasons why religion or other "claims believed to be accessible by the persons who make them" should not figure into political decision-making and argument.[61] First, a history of religious conflict provides support for abstaining from religious arguments.[62] Second, there is a problem of accessibility in practice.[63] This refers to situations in which a particular religious argument is a realist one, yet the argument is still not given much weight.[64] Greenawalt suggests that such a weak argument should not be relied upon to coerce others.[65] He offers as an example a person who believes that "a chain of reasoning about prophecies, miracles, and demonstrably effective prayer shows that scripture carries authority and is literally true."[66] However, the person also

54. *Id.* at 5.
55. *Id.* (emphasis added).
56. *Id.*
57. *Id.* at 5, 39.
58. *Id.* at 39 (It is important to note that Greenawalt does provide the following three "possible accessible grounds" for religious beliefs: (1) philosophic arguments for God, (2) independent historical evidence, and (3) "fruits of conviction," meaning that evidence of the "goodness" of a religious belief is demonstrated by the fulfilling lives of the individuals practicing that belief. *Id.* at 40-41.).
59. *Id.* at 145.
60. *Id.* at 40.
61. *Id.* at 44.
62. *Id.* at 45-46.
63. *Id.* at 45.
64. *Id.*
65. *Id.*
66. *Id.*

recognizes that many individuals do not accept the argument as being a strong one.[67] Therefore, the person should refrain from using the weak, unpersuasive argument.[68]

Last, a high error factor is the final reason for not using some realist arguments.[69] These are arguments that society at one time held valid yet later rejected because of error.[70] Greenawalt proposes that legal prohibition of conduct should be based on harms and benefits—*not because the conduct is regarded as a sin*.[71] He specifically asserts that homosexual acts should not be penalized solely because they are regarded as sinful.[72]

2. Views About the Good Life

The second category of nonaccessible views that should not be included in political decisions and arguments is views about the good life. Views about the good life are beliefs as to human good and virtue, including controversial moral claims about personal ethics and obligations.[73] Religious beliefs can fall into this category because they "tell us how to live."[74] However, some religious beliefs extend beyond this category because they also cover principles of social importance.[75] Greenawalt quotes Charles Larmore as stating that the State "should not seek to promote any particular conception of the good life because of its presumed *intrinsic* superiority—that is, because it is supposedly a *truer* conception."[76] The State should not use views about the good life as a basis to coerce individual behavior.[77] Greenawalt clarifies, "[T]he thesis of neutrality about controversial conceptions of the good should be understood as *mainly* directed to actions of the state that coerce individual behavior."[78]

3. Comprehensive Views

The third category of nonaccessible views that should have no place in political decision and argument is comprehensive views. "Comprehensive views include overarching philosophies of life, whether religious or not."[79] Utilitarianism, Marxism, and Millian liberalism are examples of comprehensive views.[80] Most religious beliefs fall into the category of comprehensive views.

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 6.
72. *Id.*
73. *Id.* at 5, 79.
74. *Id.* at 5.
75. *Id.*
76. *Id.*
77. *Id.* at 80.
78. *Id.*
79. *Id.* at 39.
80. *Id.*

However, Greenawalt suggests that it is better to classify religious views separately to avoid confusion.[81] An example of a nonreligious comprehensive view is an atheist who subscribes to Marxism or utilitarianism.[82] Greenawalt concludes, "[P]eople should refrain from relying upon all grounds that cannot be reasonably assessed by others, whether or not the grounds are religious, whether or not they are features of comprehensive views, and whether or not they are related to ideas of the good."[83]

D. Proper Political Grounds Versus Proper Political Discourse and Ordinary Citizens Versus Public Officials

Greenawalt argues that his proposed principles of restraint "correspond substantially" to principles of restraint that currently exist in the United States.[84] However, he believes that there are nuances in these principles of restraint that have not been recognized by most theorists.[85] He distinguishes between proper political grounds and proper political public discourse.[86] Greenawalt also distinguishes between what is proper for citizens as opposed to what is proper for public officials.[87] Under Greenawalt's principles of restraint, individuals are allowed more freedom as to their grounds or bases for a political decision.[88] However, greater restraint is placed on public discourse.[89] He suggests that *citizens* may rely on religious convictions when they consider difficult political issues.[90] As for *legislators and executives*, it is appropriate for them to take into account the religious views of citizens, their constituents.[91] They may also sometimes rely on their personal religious convictions as well.[92] However, for *judges*, only in rare instances may they rely on such personal convictions.[93]

1. Citizens

Ordinary citizens have the most liberty when it comes to proper political grounds and proper political discourse.[94] Because of an appreciation for religious liberty, Greenawalt rejects any restraint on ordinary citizens when it comes to their reasons or bases for a particular political position or decision.[95] He believes that ordinary citizens may rely on religious convictions when making

81. *Id.* at 5.
82. *Id.*
83. *Id.*
84. *Id.* at 6-7.
85. *Id.*
86. *Id.* at 156-63.
87. *Id.* at 7, 156-63.
88. *Id.*
89. *Id.* at 159-61.
90. *Id.* at 7.
91. *Id.*
92. *Id.*
93. *Id.*
94. *See id.* at 159-61.
95. *Id.* at 159-60.

decisions about difficult political issues.[96] As for public discourse, he believes that most citizens are not involved in political advocacy "beyond talking to family, close friends, and associates" and should not be confined in that setting to reliance on public accessible grounds.[97]

Greenawalt further distinguishes ordinary citizens from quasi-public citizens.[98] Quasi-public citizens are involved in broader public debate and include such people as media commentators and editors, presidents of large corporations and organizations, and law professors.[99] Greenawalt does place a restraint on the public discourse of these individuals.[100] He believes that these individuals should employ public reasons when publicly addressing political issues.[101] According to Greenawalt, restraint in public discourse is not too much to request of these individuals because they are "reasonably sophisticated in their understanding of public discourse and political life, and they have experience in many settings of expressing less than their full feelings about subjects."[102]

2. Legislators and Executives

As for legislators and executives,[103] Greenawalt believes that they may appropriately take into account the religious views of their constituents and even "may sometimes rely on their own religious or similar convictions."[104] However, in public discourse "explicit reliance on any controversial religious or comprehensive view would be inappropriate."[105] Although Greenawalt believes that legislators "should mainly employ public reasons," he clarifies that he is referring to religiously grounded arguments "that connect particular religious premises to conclusions of policy."[106] He emphasizes that it is appropriate in public discourse for legislators to refer to religious imagery or tradition, to call upon God's help in deliberations, and to participate in "wider cultural discussions of the significance of religion for human life and moral values."[107]

3. Judges

As for judges, Greenawalt declares that they are the most constrained of all public officials with regard to proper political grounds and public discourse.[108] Only in rare circumstances may judges rely upon personal convictions.[109] He

96. *Id.*
97. *Id.* at 160.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 156 (Greenawalt assumes that the standards for public discourse of executives should be similar to that of legislators. "If there is any difference, executives should regard themselves as *more* constrained, because they speak for all the people in a fuller sense than does any individual legislator.").
104. *Id.* at 7.
105. *Id.* at 157.
106. *Id.* at 158.
107. *Id.*
108. *Id.* at 141.
109. *Id.* at 7.

adopts the traditional model that judges should not make decisions based on personal convictions.[110] However, he does recognize that this model is aspirational.[111] He concedes, "The aspiration is not fully achievable even if all judges are intelligent, well-trained, and conscientious, but it is worth striving for by emphasizing that bases of legal judgment should be open and available to all."[112] He further concedes that judges "*cannot entirely*" make decisions free of personal moral convictions.[113] He states, "[F]undamental beliefs will influence decision even when judges conscientiously try to exclude them . . . . [D]eeply held religious convictions will sometimes have an influence on judgment."[114]

According to Greenawalt, "shared premises and ways of reasoning have priority and . . . will get judges all of the way in the vast majority of cases."[115] His view is that only in exceptional, rare circumstances are judges allowed to use personal convictions, whether religious or comprehensive.[116] He provides three exceptions to these principles of restraint for judges.[117] The first exception is "when, *if ever*," the matter or issue before the court directly necessitates the use of a religious or comprehensive view.[118] Professor Modak-Truran[119] proposes that an example of this might be what the Supreme Court was called upon to do in *Lynch v. Donnelly*—interpret the religious significance of the nativity scene.[120] The second exception is "when if ever," the precedent is conflicting or is "radically indecisive."[121] Finally, the third exception is "when, if ever, the judge finds 'the law' to be so abominable that he or she feels a duty to subvert it in some way."[122] He offers as an example a judge who considered slavery so evil that during the era of slavery he might have accordingly evaded the law.[123]

Greenawalt further argues that reliance on moral and political philosophy is more appropriate than reliance on personal religious convictions.[124] "[J]udges have reason to rely on moral philosophy that draws from basic premises of our social and political order or rests on generally accepted ways of reasoning rather than on their own religious convictions."[125] The reason why some grounds are preferred is not because they are better but because they are *shared*.[126] Therefore, he concludes, "[R]eliance on *some kinds* of moral and political philosophy is easier to justify for judges than reliance on their own religious beliefs."[127]

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110. *Id.* at 142.
111. *Id.*
112. *Id.*
113. *Id.* at 144.
114. *Id.*
115. *Id.* at 149.
116. *Id.*
117. *Id.*
118. *Id.*
119. Mark Modak-Truran, Associate Professor of Law at Mississippi College School of Law, Lecture on Law and Religion (Fall 2002).
120. Lynch v. Donnelly, 465 U.S. 668, 670-71 (1984).
121. GREENAWALT, *supra* note 3, at 149.
122. *Id.*
123. *Id.* at 149-50.
124. *Id.* at 146-47.
125. *Id.* at 147.
126. *Id.* at 146.
127. *Id.*

Although Greenawalt acknowledges that judges must sometimes on rare occasions rely on personal convictions in decision-making, he believes that judges should never include such personal convictions in their written opinions.[128] Judges should only disclose in their opinions justifications available to all, even though personal moral convictions self-consciously entered into their decisions.[129] He defends this position against criticism of being dishonest and insincere by claiming that it would be counterproductive to include religious or comprehensive grounds "if the extra grounds developed are unlikely to enlighten others, may hinder constructive dialogue, and will probably cause feelings of exclusion and alienation."[130]

Ex parte H.H. is a case in which Alabama's Chief Justice Moore violated Greenawalt's principles of restraint and the traditional model for judges. Chief Justice Moore based his opinion in part on religious and personal convictions. Furthermore, he did not hesitate to include his religious and personal convictions in his written concurring opinion. Therefore, this case will be examined and analyzed according to Greenawalt's view.

III. *Ex parte H.H.*

Ex parte H.H. involved a petition by a mother requesting physical custody of her three minor children.[131] In November 1992, the mother and father, both residents of California, were divorced, and the California court gave primary physical custody of the parties' three minor children to the mother.[132] In 1996, the mother petitioned the California court for a custody modification giving physical custody to the father, who had moved to Alabama following their divorce.[133] Her request was granted.[134]

In February 1999, the mother filed another petition for custody modification in a California court requesting that physical custody of the children be returned to her.[135] In April 1999, the father filed a complaint requesting that the case be transferred to Alabama, and his request was granted.[136] In June 2000, the Circuit Court of Jefferson County, Alabama denied the mother's request of modification of custody.[137] The trial court based its decision on a finding that the mother had failed to meet the evidentiary standards set forth in *Ex parte McLendon*.[138] According to the *McLendon* standard, "[A] party seeking a custody modification must show that the change in custody will materially promote the child's best interests, and that the benefits of the change will offset the disruptive effect caused by uprooting the child."[139]

128. *Id.* at 143.
129. *Id.*
130. *Id.* at 164.
131. *Ex parte H.H.*, 830 So. 2d at 22.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Ex parte H.H.*, 830 So. 2d at 24.
138. *Id.* (citing *Ex parte* McLendon, 455 So. 2d 863, 865 (Ala. 1984)).
139. *Id.*

A. The Facts According to the Alabama Supreme Court and the Facts According to the Alabama Civil Court of Appeals

At the trial court hearing, disputed testimony was offered.[140] The mother testified that the father physically abused the three children: a sixteen-year old daughter (who was away at camp and not present to testify); E.H., a fifteen-year old son; and A.H., a thirteen-year old son.[141] According to the Alabama Supreme Court, the mother testified that "the father had slapped E.H., causing his nose to bleed."[142] However, the Alabama Supreme Court determined that the father disputed this testimony (1) by admitting to slapping E.H.; (2) by claiming that it was done to punish E.H. for hitting the daughter; (3) by testifying that after hitting E.H., he gave him a five to ten minute lecture "about why it was wrong to hit people"; and (4) by claiming that E.H.'s nose did not bleed.[143] According to the Court of Civil Appeals of Alabama, E.H. testified that the "father hit him in the nose, causing it to bleed . . . [and] removed from the mailbox a letter he had written to the mother to describe the incident."[144]

According to the Court of Civil Appeals of Alabama, E.H. also admitted to writing a poem about committing violent acts upon the father and his stepmother.[145] Concerning the poem, E.H. testified, "I would want to but I would never do it."[146] E.H. further testified that the father kept guns in the house, which were unlocked and accessible.[147] The Supreme Court of Alabama did not elaborate on this testimony and simply stated that E.H. "indicated that he did not like his father because he was too strict and that he would rather live in California with his mother, who was less strict."[148] The Alabama Supreme Court also pointed out that the mother had referred to the father in an e-mail as "a great dad" after finding out about the incident of the father hitting E.H. and did not report the incident to the Department of Human Resources (hereinafter "DHR") until fifteen months after this litigation began.[149]

According to the Alabama Supreme Court, the mother also testified that the father had slapped the daughter and, on another occasion, had kicked her "boom box" across the room because she would not turn down the volume.[150] Again, the court determined that the father disputed this testimony by testifying that he had slapped the daughter only after she had used profane words in the context of swearing on *The Bible* and that he had kicked the "boom box" but not "across the room."[151]

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140. *Id.* at 23.
141. *Id.*
142. *Id.*
143. *Ex parte H.H.*, 830 So. 2d at 23.
144. D.H. v. H.H., 830 So. 2d 16, 19 (Ala. Civ. App. 2001), *rev'd sub nom. Ex parte H.H.*, 830 So. 2d at 21.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Ex parte H.H.*, 830 So. 2d at 24.
149. *Id.* at 23.
150. *Id.*
151. *Id.*

The Alabama Supreme Court stated that the father testified to using "many different disciplinary measures, including 'timeouts,' requiring permission before using appliances, and having the sons sit with paper bags on their heads (without restricting their air)."[152] The court further noted that DHR had visited the home and had taken no action.[153] However, the Alabama Civil Court of Appeals again elaborated on these "many different disciplinary measures."[154] According to that court, the father admitted to "slapping the children in the face and whipping them with a belt and a hanger."[155] He also admitted to one occasion of making the boys sit in the yard with paper bags over their heads for thirty-three minutes because they had been late in meeting him at a specified time in the mall.[156]

The father also stated that another disciplinary measure that he used was making the children ask permission to get food from the refrigerator and to use electrical appliances.[157] He also admitted that he intercepted the children's mail and e-mails to their mother and taped their telephone calls.[158] The Alabama Supreme Court pointed out that the father testified that "he tape-recorded the telephone calls because the children acted suspiciously and secretive after they returned from a visit with their mother."[159] The Alabama Supreme Court further clarified that the father disabled the children's e-mail for awhile "because the daughter had given her address to a man on the Internet."[160]

According to the Alabama Civil Court of Appeals, E.H. testified that the father punished him by either physically hitting him or by not allowing him the use of the bathroom, electricity, and the refrigerator.[161] E.H. further testified that whenever he asked his father if he could live with his mother, the father would use derogatory terms concerning the mother's sexual orientation.[162] The father admitted to routinely calling their mother a "lying alcoholic lesbian."[163]

The opinion of the Alabama Civil Court of Appeals also reveals that A.H., the youngest son, testified that he had seen the father hit E.H. in the face and had heard the father hit his sister.[164] A.H. also testified that the father whipped them all and called them profane names.[165] He also expressed a desire to live with his mother because of his bad relationship with his father and stepmother.[166] He stated that "it was easier to talk to the mother because she would not ridicule him, whereas, . . . the father might hit him."[167] He said that he had quit "playing

152. *Id.*
153. *Id.*
154. *Ex parte H.H.*, 830 So. 2d at 23.
155. *D.H.*, 830 So. 2d at 19.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Ex parte H.H.*, 830 So. 2d at 23.
160. *Id.*
161. *D.H.*, 830 So. 2d at 19.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 19–20.
167. *D.H.*, 830 So. 2d at 20.

sports because his father had 'hinted that it was wasting his time—that he didn't want to come to the games.'"[168] He further testified that his stepmother "had 'taken over' the computer" that his maternal grandmother had given him and that she "had deleted all of their games."[169] The Alabama Supreme Court simply revealed, "A.H., the youngest child, testified that he did not like his stepmother because she had 'taken over' his computer."[170]

The Alabama Civil Court of Appeals also elaborated on the mother's current circumstances; whereas, the Alabama Supreme Court did not. The mother testified to her stability: (1) being employed with Universal Studios for fifteen years; (2) earning moderate income; (3) living "in the same house that the children had grown up in"; (4) being involved with her children in "community service projects, church activities, and extracurricular school activities" when she had physical custody of the children; (5) being a *recovering* alcoholic since 1995; and (6) having "resided with her female companion since December 1995," and having entered into a statutory domestic partners' agreement with her companion in April of 2000.[171]

The mother stated that it was her desire that her children live with her so that they could and would be living in a "nonsmoking, nondrinking, nonviolent household."[172] To meet her burden of proving a material change in circumstances, the mother offered evidence of "the children's poor grades, lack of extracurricular activities, lack of religious training, and living in an environment with family violence."[173] When asked if she would consider ending her relationship with her domestic partner, she commented, "We had talked about this. And it would be really difficult because she is a part of our family. But my kids are number one and their safety and well-being are first and foremost. And so yes, that would be an option."[174]

B. Alabama Civil Court of Appeals

The Alabama Civil Court of Appeals concluded that the mother had presented sufficient evidence demonstrating that "a change in custody would materially promote the children's best interests and welfare."[175] The court highlighted the mother's stability and concluded that "[n]o evidence indicated that the mother's homosexual relationship, which is accepted under California law through the 'Domestic Partnership Act,' would have a detrimental effect on the well-being of the children."[176] The court also determined that "the father's verbal, emotional, and physical abuse can be considered family violence, and that abuse consti-

168. *Id.* at 19–20.
169. *Id.* at 20.
170. *Ex parte H.H.*, 830 So. 2d at 24.
171. *D.H.*, 830 So. 2d at 20.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*

tutes a change of circumstances."[177] The Court cited Alabama's Custody and Domestic or Family Violence Abuse Act.[178]

The court also noted that the following factors were considered important but were not controlling: (1) the age of the children, (2) the desire of the children, and (3) the "interpersonal relationship between each child and each parent."[179] While the court recognized "the presumption of correctness that attaches to a trial court's judgment that is based on *ore tenus* evidence," the court reversed the trial court's decision based on the conclusion that "*evidence contained in the record does not support the judgment.*"[180]

C. Alabama Supreme Court's Majority Opinion

The Alabama Supreme Court held that "the Court of Civil Appeals impermissibly reweighed the evidence."[181] The Alabama Supreme Court first noted the following findings of the trial court:

> That the [mother] previously had custody and voluntarily surrendered custody to [the father]. The [mother] says the [father] is a domestic abuser. The [father] says the [mother] is an alcoholic lesbian. There can be no surprise that these children have serious issues in their lives. In fact, it is probably remarkable that the children have done as well as they have.
>
> While not approving of the [father's] *occasional excessive disciplinary measures* or condoning the [mother's] lifestyle, this Court cannot rewrite the lives of the parties or [the] children. It can only rule based upon application of the law to the facts in evidence and attempt such remedial measures as may seem appropriate.[182]

The court stressed that the standard of review in cases involving evidence presented *ore tenus* is that "in the absence of specific findings of fact, appellate courts will assume that the trial court made those findings necessary to support its judgment, unless such findings would be clearly erroneous."[183] The court made the following conclusion concerning the decision of the Court of Civil Appeals to reverse the trial court's order:

> Although there was some testimony, standing alone, that might suggest abuse, this evidence was disputed at trial. The trial judge, who was in a better position to evaluate the credibility of the testimony and who observed the demeanor of the witnesses,

177. *D.H.*, 830 So. 2d at 20 (citing E.M.C. v. K.C.Y., 735 So. 2d 1225 (Ala. Civ. App. 1999)).
178. ALA. CODE § 30-3-131 (1975).
179. *D.H.*, 830 So. 2d at 20.
180. *Id.* at 20-21 (emphasis added).
181. *Ex parte H.H.*, 830 So. 2d at 25.
182. *Id.* at 24 (alteration in original) (emphasis added).
183. *Id.* at 25 (quoting *Ex parte* Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996) (citation omitted)).

> found that, although the father's disciplinary actions may occasionally be excessive, no abuse had occurred. . . . The Court of Civil Appeals, however, adopted the mother's arguments without acknowledging the existence of contradictory testimony that supported the trial court's holding.[184]

D. Chief Justice Moore's Concurring Opinion

Chief Justice Moore opened his concurring opinion by stating the following:

> I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.[185]

He further stated, "Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated."[186]

He argued that such behavior is destructive to society, destructive and detrimental to children, and "an inherent evil against which children must be protected."[187] He vehemently opposed the Civil Court of Appeals characterization of homosexual conduct as not having a detrimental effect on children.[188] He retorted that it is not "an appellate court's duty to redefine the morals of the State of Alabama."[189]

Chief Justice Moore provided legal precedent in Alabama condemning homosexuality and proclaiming it a crime. For example, in *Ex parte J.M.F.*, the Alabama Supreme Court declared that a homosexual lifestyle is "'neither legal in this state, nor moral in the eyes of most of its citizens.'"[190] Likewise, in *Ex parte D.W.W.*, the Alabama Supreme Court made clear that homosexual conduct violates the criminal law of Alabama and that "the restriction of visitation was a 'common tool [] used to shield a child from the harmful effects of a parent's illicit sexual relationship—heterosexual or homosexual.'"[191] Chief Justice Moore also cited the Alabama Code that makes homosexual conduct a misdemeanor.[192] In *Williams v. State*, the Alabama Court of Criminal Appeals con-

184. *Id.* at 25–26.
185. *Id.* at 26 (Moore, C.J., concurring).
186. *Id.*
187. *Ex parte H.H.*, 830 So. 2d at 26.
188. *Id.*
189. *Id.* at 27.
190. *Id.* at 28 (quoting *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998) (quoting *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998))).
191. *Id.* (quoting *Ex parte* D.W.W., 717 So. 2d at 796).
192. *Id.* at 29 (citing ALA. CODE § 13A-6-65).

cluded that homosexual conduct "involves moral turpitude,"[193] which Chief Justice Moore emphasized—means evidence of "'an inherent quality of baseness, vileness, [and] depravity,' and 'implies something immoral itself, regardless of the fact whether it is punishable by law.'"[194]

Chief Justice Moore next used common law to justify Alabama's law condemning homosexuality.[195] He began by noting that American law was derived from the common law of England.[196] He cited William Blackstone's *Commentaries on the Laws of England*[197] as "authoritative for applying the common law today" and based his argument that natural law is a part of common law on Blackstone's *Commentaries*.[198] According to Chief Justice Moore, common law was founded on natural law.[199] Based on Blackstone's *Commentaries*, he defined natural law as "the law of nature and of nature's God as understood by men through reason, but aided by direct revelation found in the Holy Scriptures."[200] Again, using Blackstone's *Commentaries* as authority, he explained, "[B]ecause our reason is full of error, the most certain way to ascertain the law of nature is through direct revelation."[201] According to Blackstone's *Commentaries*, common law or "human law" is based on natural law and revealed or divine law found in the Holy Scriptures.[202] Furthermore, natural law and divine law are superior to human laws.[203]

Chief Justice Moore cited additional sources indicating that "human laws are only declaratory of, and act in subordination to, the former [divine and natural law]."[204]

> James Wilson, Associate Justice on the first United States Supreme Court and signer of both the Declaration of Independence and the United States Constitution, said: "Human law must rest its authority ultimately upon the authority of that law which is divine. . . . Far from being rivals or enemies, religion and law are twin sisters, friends, and mutual assistants. Indeed, these two sciences run into each other."[205]
>
> John Jay, first Chief Justice of the United States Supreme Court and coauthor of the *Federalist Papers*, declared: "[N]o

193. Williams v. State, 316 So. 2d 362, 363 (Ala. 1975).
194. *Ex parte H.H.*, 830 So. 2d at 30 (quoting *Williams*, 316 So. 2d at 363 (Ala. 1925) (quoting MCELROY, LAW OF EVIDENCE IN ALABAMA § 145.01(7) (2d ed. 1959))).
195. *See id.* at 31-35.
196. *Id.* at 31.
197. 1 WILLIAM BLACKSTONE, COMMENTARIES 42.
198. *Ex parte H.H.*, 830 So. 2d at 31.
199. *Id.* at 32.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Ex. parte H.H.*, 830 So. 2d at 32 (quoting 1 BLACKSTONE, COMMENTARIES 42).
205. *Id.* (quoting JAMES WILSON, *Of the General Principles of Law and Obligation*, *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON 104-06 (Bird Wilson ed., Bronson and Chauncey 1804)).

> sovereign ought to permit those who are under his Command to violate the precepts of the Law of Nature, which forbids all Injuries . . . ."[206]

Chief Justice Moore quoted the following passage of the Declaration of Independence as further evidence of the superiority of natural and divine law:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which *the laws of nature and of nature's God* entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[207]

Chief Justice Moore argued that it would defy logic to declare that our founding fathers could use "the laws of nature and of nature's God" to separate or secede from their country but could not use "the law of God" to "decide the fundamental basis of their laws."[208]

Finally, Chief Justice Moore concluded, "[H]omosexuality is strongly condemned in the common law because it violates both natural and revealed law."[209] He pointed to the following Old Testament verse found in *Leviticus* 20:13 condemning homosexuality: "[I]f a man lies with a male as he lies with a woman, both of them have committed an abomination."[210] According to Chief Justice Moore, American laws that condemn homosexuality were founded on this passage.[211] He went on to quote Roman law found in the *Corpus Juris Civilis*, which, as Moore pointed out, served as the basis for the law of the Christian Church and European and English civil law: "Sodomy is high treason against the King of Heaven."[212]

Chief Justice Moore defended his position disfavoring homosexuality as not being "invidious discrimination" and not "legislating personal morality."[213] He claimed that the State's interest in promoting the general welfare of the people validated his opinion.[214] He stated, "Providing for the common good involves maintaining a public morality through both our criminal and civil codes, based upon the principles that *right conscience* demands, without encroaching on the

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206. *Id.* (quoting *John Jay's Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 22, 1793, Richmond, Virginia, in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 at 386 (Maeva Marcus ed., 1988)).

207. *Id.* (alteration in original) (quoting THE DECLARATION OF INDEPENDENCE).

208. *Id.*

209. *Id.* at 33.

210. *Ex parte H.H.*, 830 So. 2d at 33.

211. *Id.*

212. *Id.* at 34 (quoting Raymond B. Marcin, *Natural Law, Homosexual Conduct, and the Public Policy Exception*, 32 CREIGHTON L. REV. 67, 67 (1998) (quoting 58 C.J. 785 n.10 (1932))).

213. *Id.* at 35.

214. *Id.*

jurisdiction of other institutions and the declared rights of individuals."[215] He further stated, "The State carries . . . the power to prohibit conduct with physical penalties, such as confinement and even execution. It must use that power to prevent the subversion of children toward this lifestyle, to not encourage a criminal lifestyle."[216]

Chief Justice Moore viewed the awarding of child custody to a parent who engaged in homosexual conduct as rewarding that parent for committing a crime.[217] He considered this "a reprehensible affront to the laws of family government that the State must preserve."[218] He argued against change by stating the following:

> No matter how much society appears to change, the law on this subject has remained steadfast from the earliest history of the law, and that law is and must be our law today. The common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, *that fact alone would render him or her an unfit parent.*[219]

Chief Justice Moore went on to describe homosexual conduct as "an inherent evil, and an act so heinous that it defies one's ability to describe it."[220] He concluded with the following words:

> The common law adopted in this State and upon which our laws are premised likewise declares homosexuality to be detestable and *an abominable sin.* Homosexual conduct by its very nature is immoral, and its consequences are inherently destructive to the natural order of society. *Any person who engages in such conduct is presumptively unfit to have custody of minor children under the established laws of this State.*[221]

IV. ANALYSIS

A. Chief Justice Moore's Concurring Opinion—A Violation of Greenawalt's Principles of Restraint?

1. Was It Appropriate for Moore to Rely on His Religious Convictions in His Deliberations?

Greenawalt would consider Chief Justice Moore's reliance on his personal religious convictions inappropriate. According to Greenawalt, only in rare circumstances may a judge, the most constrained public official, rely on his or her

215. *Id.* (emphasis added).
216. *Ex parte H.H.*, 830 So. 2d at 35.
217. *Id.*
218. *Id.*
219. *Id.* (emphasis added).
220. *Id.* at 37.
221. *Id.* at 38 (emphasis added).

personal convictions.[222] Again, Greenawalt's exceptions to this rule are (1) when the issue before the court directly necessitates the use of religion, (2) when the precedent is conflicting or indecisive, or (3) when "the judge finds 'the law' to be so abominable that he or she feels a duty to subvert it in some way."[223] The first exception was not met because unlike the issue of the religious significance of the nativity scene considered in *Lynch v. Donnelly*,[224] the issue of the parental fitness does not directly necessitate the use of religion. Neither was Greenawalt's second exception met because, according to Chief Justice Moore, Alabama precedent was on his side. The precedent in Alabama was not conflicting or indecisive.

Greenawalt's third exception that allows a judge to rely on personal convictions when the law is "so abominable" to the judge "that he or she feels a duty to subvert it in some way" was arguably not met either for two reasons.[225] First, the existing Alabama law, according to Chief Justice Moore, was not abominable to him. According to Chief Justice Moore, the law was in his favor. He argued that homosexual conduct was clearly illegal in Alabama and that precedent allowed the restriction of parental visitation to protect a child from the parent's illegal homosexual relationship.[226] Therefore, the use of religion was unnecessary.

Secondly, it is arguable that Greenawalt's third exception should only be used when a class of individuals or an individual's right to liberty or personal autonomy is being violated, not when the State is trying to coerce or restrain individual behavior. In Greenawalt's example, the judge who found slavery repugnant would have properly subverted the law to protect the liberty rights of a class of individuals, not to restrain those liberty rights.[227] Also, according to a basic position of Greenawalt, "prohibition should depend on harms and benefits that are comprehensible in nonreligious terms in this life."[228] Because none of the exceptions were satisfied, based on Greenawalt's view, Chief Justice Moore inappropriately relied on his religious convictions.

2. Was It Appropriate for Chief Justice Moore to Express His Religious Convictions in His Written Opinion?

It has already been determined that Chief Justice Moore inappropriately relied on his religious convictions. However, for the sake of argument, assuming Chief Justice Moore might have appropriately relied on his religious convictions, was it appropriate for him to include those convictions in his written opinion? According to Greenawalt, the answer is a simple, "no—never."

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222. GREENAWALT, *supra* note 3, at 149.
223. *Id.*
224. *Lynch*, 465 U.S. 668.
225. GREENAWALT, *supra* note 3, at 149.
226. *Ex parte H.H.*, 830 So. 2d at 28.
227. GREENAWALT, *supra* note 3, at 149-50.
228. *Id.* at 6.

Greenawalt states, "I believe that even when the opinion represents the voice of a single judge, the opinion should symbolize the aspiration of interpersonal reason and be limited to public reasons."[229]

However, for Chief Justice Moore, Alabama law is based on common law, and common law is based on natural law, which is derived from "divine or revealed law."[230] Blackstone and at least two members of the first United States Supreme Court considered natural law and Christianity part of the common law.[231] He pointed out that Blackstone and two members of the first United States Supreme Court believed that divine law superceded human laws.[232] Finally, based on the *Declaration of Independence*'s reference to "the laws of nature and of nature's God," Chief Justice Moore concluded that "the law of God" was used by our founding fathers "to decide the fundamental basis of their laws."[233]

This historical argument by Chief Justice Moore might be countered by Greenawalt's historical argument. Greenawalt argues, "The history of religious conflict in Western Europe and the growth of toleration and liberal democracy out of that conflict inform all the principles of restraint that people now propose."[234] Greenawalt claims that reliance on religious grounds "is contrary to fundamental premises of separation of church and state and religious liberty, or is particularly threatening to social life."[235] Greenawalt asserts, "The most basic defense of separation of church and state is that it is conducive to religious liberty; religious liberty is considered *more fundamental* than nonestablishment of religion."[236]

However, it is important to note that Greenawalt does *not* believe that all reliance on religious grounds is improper.[237] He recognizes that our country's political life has historically been influenced and continues to be influenced by religion.[238] However, he concludes that the worries of William Marshall[239] provide the best argument for keeping religion out of politics.[240] "'Religion, if unleashed as a political force, may also lead to a particularly acrimonious divisiveness among different religions.' Fervent beliefs may become fuel for intolerance, repression, hate, and persecution."[241]

A prime example of a fervent belief that becomes fuel for intolerance, repression, hate and persecution is Chief Justice Moore's intense moral conviction that the State should punish homosexual parents by denying them parental custody rights. Chief Justice Moore referred to the State's "power to prohibit conduct with *physical* penalties, such as *confinement* and even *execution*."[242] He

229. *Id.* at 150.
230. *Ex parte H.H.*, 830 So. 2d at 32-34.
231. *Id.* at 31-32.
232. *See id.*
233. *Id.* at 33.
234. GREENAWALT, *supra* note 3, at 62.
235. *Id.*
236. *Id.* at 67.
237. *Id.* at 69.
238. *Id.*
239. William P. Marshall, *The Other Side of Religion*, 44 HASTINGS L. J. 843 (1993).
240. GREENAWALT, *supra* note 3, at 70.
241. *Id.* (quoting Marshall, *supra* note 238, at 859).
242. *Ex parte H.H.*, 830 So. 2d at 35 (emphasis added).

concluded that the State "must use that power to prevent the subversion of children toward this lifestyle, to not encourage a criminal lifestyle."[243] He considered the granting of child custody to a homosexual parent "a reprehensible affront to the laws of family government that the State must preserve."[244] These statements indicate the intensity of Chief Justice Moore's *personal* moral conviction. Again, according to Greenawalt and the traditional model, judges should not rely on *personal* convictions.[245]

Another example of Marshall's concern of a fervent religious belief becoming "fuel for intolerance, repression, hate, and persecution"[246] is Chief Justice Moore's attempt to create new law declaring a homosexual parent presumptively unfit.[247] According to Chief Justice Moore, "if a person openly engages in such a practice, that fact alone would render him or her an unfit parent."[248] This clearly violates Greenawalt's model for judges and the traditional model for judges. Greenawalt states, "Officials who apply laws must pay attention to authority."[249] Chief Justice Moore has no authority upon which he can base this assumption. He claimed to be basing his opinion on law. It is true that, as Chief Justice Moore points out, Section 13A-6-65(3)(b) of the Alabama Code classifies deviate sexual intercourse as a Class A misdemeanor.[250] It is also true that the definition of "deviate sexual intercourse" found in Section 13A-6-60(2) of the Alabama Code covers homosexual conduct.[251] However, it is not true that the commission of a Class A misdemeanor alone would render a parent unfit.

Chief Justice Moore also quoted an Old Testament verse calling homosexual conduct "an abomination."[252] He concluded that his position was justified because homosexual conduct violates not only common law but also natural and revealed law.[253] Chief Justice Moore's reliance on the Old Testament violates Greenawalt's rule against using nonaccessible grounds because it excludes those who do not accept the Holy Scriptures as truth. This ground is not acceptable because it is not open to all.

Another one of Greenawalt's reasons for rejecting this nonaccessible view is because unfairness would result.[254] In other words, a person's right to equality or liberty would be impaired.[255] Denying a parent the custody of his or her children based solely on the parent's sexual orientation is denying that parent the right to equality and liberty. In the words of Greenawalt, "[I]n relations among people, or citizens, respect for integrity and equality precludes using some bases for decision that might otherwise be appropriate."[256]

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243. *Id.*
244. *Id.*
245. GREENAWALT, *supra* note 3, at 142.
246. *Id.* at 70 (quoting Marshall, *supra* note 238, at 859).
247. *See Ex parte H.H.*, 830 So. 2d at 35.
248. *Id.*
249. GREENAWALT, *supra* note 3, at 31.
250. *See* ALA. CODE § 13A-6-65(3)(b) (1975).
251. *See id.* § 13A-6-60(2).
252. *Ex parte H.H.*, 830 So. 2d at 33.
253. *Id.*
254. GREENAWALT, *supra* note 3, at 24.
255. *Id.*
256. *Id.*

However, Chief Justice Moore argued that his position was "not invidious discrimination nor is it legislating personal morality."[257] He believed that his position was "based upon the principles that *right* conscience demands."[258] This argument might be an example of a view based on the "good life," a view that Greenawalt believes should also be excluded.[259] As stated previously, views about the good life are beliefs as to human good and virtue, including controversial moral claims about personal ethics and obligations.[260] Chief Justice Moore is presuming that his view is intrinsically superior and is, therefore, trying to coerce individual behavior. This view "about the good life" is not an appropriate basis for a judicial opinion.

Chief Justice Moore also argued that homosexual conduct has a detrimental effect on children.[261] This argument is another example of a nonaccessible view because it has no basis of proof. In the words of Greenawalt, "[T]he believer lacks bases to show others the truth of what he believes."[262] The argument that children of homosexual parents suffer detrimental effects is based on an assumption, which may or may not be true. Finally, Chief Justice Moore argued that homosexuality was "an abominable sin."[263] According to Greenawalt, legal prohibition of conduct should be based on harms and benefits and not because the conduct is regarded as a sin.[264] As noted previously, Greenawalt specifically asserts that homosexual acts should not be penalized solely because they are regarded as sinful.[265]

B. The Majority Opinion—A Violation of Greenawalt's Principles of Restraint?

It has previously been determined that the issue of parental fitness of a homosexual parent does not fit into one of Greenawalt's exceptions to the rule against judges using religion as a basis for decision. However, again, assuming for the sake of argument that it does fit into one of Greenawalt's exceptions, is the majority opinion an example of how Chief Justice Moore, according to Greenawalt, should have written his opinion? Remember that Greenawalt believes that judges should not include religious views in their written opinions even though they relied on those views. Judges should only disclose in their opinions justifications available to all, even though personal moral convictions self-consciously entered into their decisions.[266] A comparison of the Alabama Supreme Court's opinion to that of the Alabama Civil Court of Appeals indicates that it is quite possible that the majority did not include its entire bases for decision in the written opinion. After comparing the two conflicting opinions, one might question whether personal moral convictions self-consciously entered into the Alabama Supreme Court's decision.

257. *Ex parte H.H.*, 830 So. 2d at 35.
258. *Id.*
259. GREENAWALT, *supra* note 3, at 5.
260. *Id.* at 5, 79.
261. *Ex parte H.H.*, 830 So. 2d at 26.
262. GREENAWALT, *supra* note 3, at 39.
263. *Ex parte H.H.*, 830 So. 2d at 38.
264. GREENAWALT, *supra* note 3, at 6.
265. *Id.*
266. *Id.* at 143.

The Alabama Supreme Court held sacred the trial court's characterization of the father's abuse inflicted upon his children as "occasional excessive disciplinary measures."[267] However, the Alabama Civil Court of Appeals determined that the father's conduct toward his children constituted family violence, which amounted to a change of circumstances warranting "a change in custody [that] would materially promote the children's best interests and welfare."[268]

The Alabama Supreme Court criticized the Alabama Court of Civil Appeals for "adopt[ing] the mother's arguments without acknowledging the existence of contradictory testimony that supported the trial court's holding."[269] However, it appears that the Alabama Court of Civil Appeals gave in its opinion a more detailed account of the trial court record. Whereas, it appears that the Alabama Supreme Court omitted much of the testimony concerning the father's abusive outbursts. The Alabama Supreme Court even appears to excuse the father's abusive outbursts.[270] Even though the majority opinion of the Alabama Supreme Court did not focus on the mother's homosexual relationship, it begs the question, "Why excuse the abuse?"

Instead of focusing on the mother's homosexual relationship, the court seemed to focus on first, that the mother was initially given custody and, subsequently, "after the mother had begun a homosexual relationship," had "herself" requested that the father be granted custody.[271] Secondly, the court pointed out that the mother had referred to the father as "a great dad" in an e-mail after being told that the father had hit E.H. causing his nose to bleed and that the mother did not report the incident to DHR until fifteen months after litigation began.[272]

The Alabama Supreme Court downplayed the abuse by emphasizing that (1) the father admitted the abuse; (2) it was performed as punishment for E.H. hitting the daughter or because the daughter used profane words in the context of swearing on the Bible; (3) the father only kicked the daughter's "boom box" and did not kick it "across the room"; and (4) the father made the sons wear paper bags over their heads but did not restrict their air.[273] The father characterized forms of punishing the children such as hitting them, denying them use of the bathroom, electricity, and the refrigerator, or making them sit outside wearing paper bags over their heads for thirty-three minutes as "us[ing] many different disciplinary measures."[274] In its re-characterization of the father's "abuse," the court stated that these "many different disciplinary measures" included "'time-outs,' requiring permission before using appliances, and having the sons sit with paper bags on their heads (without restricting their air)."[275]

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267. *Ex parte H.H.*, 830 So. 2d at 24.
268. *See D.H.*, 830 So. 2d at 20.
269. *See Ex parte H.H.*, 830 So. 2d at 25-26.
270. *Id.* at 23-26.
271. *Id.* at 22.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Ex parte H.H.*, 830 So. 2d at 22.

The Alabama Supreme Court completely ignored or downplayed the desire of the two sons, ages fifteen and thirteen, to live with their mother. As for E.H.'s testimony regarding a desire to live with his mother, the court stated that E.H. wanted to live with his mom because she was less strict. The court completely ignored his testimony concerning the abuse and omitted the testimony about the poem in which he described violent acts against the father and stepmother.

The court simply stated that the younger son "testified that he did not like his stepmother because she had 'taken over' his computer."[276] The court ignored his testimony that the computer was given to the children by the maternal grandmother and that the stepmother had deleted all of their games. It also omitted his testimony as to his father's abuse and his bad relationship with his father. It further omitted the son's testimony that it was easier for him to talk to his mom because she would not ridicule him whereas his father might hit him.[277]

It appears that the Alabama Supreme Court, not the Alabama Civil Court of Appeals, failed to acknowledge "the existence of contradictory testimony." Why did the Alabama Supreme Court ignore, omit, or downplay the testimony of abuse? Was the Alabama Supreme Court simply following the law that does not allow an appellate court to "sit in judgment of disputed evidence presented *ore tenus* before the trial court,"—the court "in the best position to make a custody determination" because "it hears the evidence and observes the witnesses"?[278] Or is it possible that the Alabama Supreme Court failed to meet the aspirational goals of judges to *not* make decisions based on personal convictions? According to Greenawalt, judges "*cannot entirely*" make decisions free of personal moral convictions.[279] "[F]undamental beliefs will influence decision even when judges conscientiously try to exclude them. . . . [D]eeply held religious convictions will sometimes have an influence on judgement."[280]

Finally, if, as suggested by Chief Justice Moore, the law is so clear in Alabama that homosexual conduct is illegal and precedent allows restricting visitation to protect a child from a parent's illegal homosexual relationship, why did the majority not base its written opinion on that law and precedent? Could it be that the majority recognized that the argument might be based on what Greenawalt referred to as "values that have illegitimate or unhealthy roots"—illegitimate and unhealthy roots of prejudice against homosexuals?[281]

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276. *Id.* at 24.
277. *See D.H.*, 830 2d at 20.
278. *See Ex parte H.H.*, 830 So. 2d at 24.
279. GREENAWALT, *supra* note 3, at 144.
280. *Id.*
281. *Id.* at 30.

V. CONCLUSION

I conclude with the words of Greenawalt that, in my humble opinion, are proper and appropriate.

> If I am going to coerce others, I should have reasons that I think are fairly applicable to them. Simply satisfying my own personal feelings about a subject is not sufficient in a society that accepts basic notions of liberty and equality. The freedom of people to decide what to do with their lives should not be subject to the whim of others, even a majority, about what happens to feel right.[282]

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282. *Id.* at 37.